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No. 586

In the Supreme Court of the United States

OCTOBER TERM, 1957

TORA UPSTEAD RYSTAD, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The majority and concurring opinions of the Court of Appeals (R. 31–34) are reported at 246 F. 2d 246. The findings of fact and conclusions of law of the District Court appear at R. 17–22.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1957 (R. 35). A petition for rehearing was denied on September 5, 1957 (R. 37). The petition for a writ of certiorari was filed on October 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court's prior, unappealed, decision upholding the validity of the order deporting petitioner was final and determinative of the issues in the instant case.

2. Whether the Immigration and Naturalization Service hearing officer erred in denying petitioner access to F. B. I. reports prepared by the testifying government witness.

3. Whether the Immigration and Naturalization Service hearing officer erred in drawing an adverse inference from petitioner's refusal to testify after he advised her that the government's evidence had shown that she had been a Communist Party member and there was no contradictory evidence.

4. Whether the order for the deportation of petitioner as one who, after entry, had been a member of the Communist Party is based on reasonable, substantial and probative evidence.

STATUTE INVOLVED

8 U. S. C. 1251 (a):

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United

States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or * * *

* * * * *

STATEMENT

Petitioner, born in Norway in 1909, was ordered deported after a hearing in August and September 1954 on the ground that, after entry in 1928 and 1938, she had been a member of the Communist Party in 1945 and 1946 (I. F. 60–64).[1] At the hearing before a special inquiry officer of the Immigration and Naturalization Service, the evidence in support of this conclusion was presented by government witness Fred L. Thornburgh, who, with the knowledge of and with payment by the F. B. I., had been a member of the Communist Party from 1942 through 1947 (I. F. 6–8, 14).

In 1944, Mr. Thornburgh transferred to the Holly Park Branch of the Communist Party of the United States, Seattle, Washington, and became membership director of that Branch either in 1945 or 1946 (I. F. 8, 9).[2] As such director, he kept track of the party

[1] The designation "I. F." refers to the Immigration and Naturalization Service file. It is lodged with the Clerk of this Court.

[2] By 1945 the organization had changed back its name from the Communist Political Association to the Communist Party of the United States (I. F. 13).

membership and issued the dues stamps and membership books (I. F. 10, 27, 33). He had no specific recollection of the time when he gave a membership book to petitioner but he is certain that he made one out in her name (I. F. 35, 54). He also issued stamps to her which indicated payment of dues by her but could not remember any specific instances of issuing stamps to her (I. F. 33, 37). In response to a question of whether he could name some of the ordinary members of the Holly Park Branch, he named several names without mentioning petitioner and then said (I. F. 9): "that is all I can remember offhand. Oh, pardon me, Gus Rystad, and Tora Rystad, Clarence Greenwood. That is all I can think of." He identified petitioner at the hearing as a member who attended 15 to 20 Communist Party meetings (I. F. 9, 11). He testified that some of the meetings were closed (I. F. 12), and remembered one particular "important" closed meeting which petitioner attended and which was held in a member's home (I. F. 40). On cross-examination, in response to a question as to whether the witness remembered seeing petitioner at any closed meetings, he said "No particular meeting that I can pick out from any other meeting" (R. 50). Later, he said that there was "no doubt" that petitioner attended "a closed meeting" (R. 54). He also said that petitioner was not a particularly active member of the unit (I. F. 12).

Mr. Thornburgh testified from memory. He did not use notes to refresh his recollection (I. F. 37). He testified that during his Communist Party membership

he made reports to the F. B. I. concerning the activities and membership of the Communist Party and also indicated that the F. B. I. had photostatic copies of the membership cards (I. F. 8, 38).

During the hearing, petitioner requested the F. B. I. reports prepared by the government witness. The request was denied on the grounds that the reports were confidential and that the witness did not use the reports to refresh his memory and that the witness himself was present (I. F. 14–15).

At the conclusion of the government's case, petitioner did not take the stand nor testify in her own behalf nor produce any evidence on her behalf. She was given a continuance of 28 days from August 24 to September 21, 1954, to present her case (I. F. 56). At the reconvened hearing on September 21, 1954, despite the fact that the hearing officer advised petitioner that evidence presented by the government showed that she was a Communist Party member and that under these circumstances petitioner had a duty to speak, no evidence was produced by petitioner or upon her behalf (I. F. 58).

On September 27, 1954, the special inquiry officer of the Immigration and Naturalization Service found that petitioner was an alien who had been a member of the Communist Party of the United States in 1945 and 1946, and hence deportable (I. F. 60–61). He based this conclusion on the testimony of Mr. Thornburgh who, he said, was unable to recall many details, but whose testimony he found credible (I. F. 62–63). He said that petitioner had presented no evidence and

added that (I. F. 62), "Although given full opportunity to speak, respondent remained silent. The burden of going forward with the evidence [after the government had shown that petitioner had been a Communist Party member] was on the respondent, a burden which she did not assume. Under these circumstances an adverse inference can be drawn from her silence and can be properly considered as evidence in the case. In a deportation proceeding the respondent is under a duty to speak and where there is a duty to speak, silence is evidence of a most persuasive character."

On appeal to the Board of Immigration Appeals, petitioner contended that on the basis of this Court's decision in *Galvan* v. *Press*, 347 U. S. 522, decided in May, 1954, prior to the hearing in this case, she was at most a nominal member of the Communist Party, that the order of deportation was not supported by substantial evidence, that the F. B. I. reports should have been shown to her, and that no adverse inference should have been drawn from her refusal to testify (I. F. 65–72). On March 8, 1955, the Board of Immigration Appeals affirmed the order of deportation (I. F. 74–79). It held that the decision of the special inquiry officer was supported by the evidence and that the officer committed no error in denying petitioner's motion to produce F. B. I. confidential records and in drawing an adverse inference from petitioner's failure to testify (I. F. 75–78).

On July 28, 1955, petitioner filed a motion to reopen the proceedings before the Board, solely for the pur-

pose of presenting evidence on her behalf to show that she had never been a member of the Communist Party. The attorney's affidavit attached to the motion stated that he intended to controvert the testimony of Mr. Thornburgh by introducing testimony of persons named by Mr. Thornburgh as belonging to the Holly Park Branch Communist Party of the United States in 1945 and 1946 and by obtaining, if at all possible, the F. B. I. records—all of which would tend to show that petitioner had never been a member of the Communist Party. Counsel also indicated that, from conversations he had had with witness Thornburgh, the witness had some doubts as to whether petitioner had been a member of the Communist Party, as he had testified at the hearing (I. F. 81–91).

On August 10, 1955, petitioner was ordered to appear for deportation and a stay of deportation was refused (see I. F. 94, 98). On August 9, 1955, she filed an action in the United States District Court for a judicial review of the administrative proceedings, a declaratory judgment, and injunctive relief (R. 16), on substantially the same grounds as those urged before the Board of Immigration Appeals. On September 15, 1955, the Board of Immigration Appeals denied petitioner's motion to reopen (I. F. 101). It said that the Immigration and Naturalization Service had submitted an affidavit by Mr. Thornburgh in which he asserted that all of the testimony given by him at the trial was true and that he had no intention of retracting or changing that testimony (Ex. B). As to the other evidence which petitioner's coun-

sel claimed he would introduce at a reopened hearing and which he alleged would show that petitioner had never been a Communist Party member, the Board said that this claim was unsupported by any affidavits or statements from the individuals with whom counsel said he had spoken. Furthermore, the Board found that petitioner had had ample opportunity to present such evidence at the hearing, particularly since she had been given a 28-day continuance to present evidence and she produced none at the reopened hearing. Also, before the hearing was concluded she had been informed that her silence would be used against her, and she still refused to speak. Accordingly, the Board concluded that she had already been granted a fair hearing (I. F. 101–103).

On November 10, 1955, the District Court denied petitioner the relief she requested (R. 16, 20). It found that the administrative proceedings were "supported by reasonable, substantial and probative evidence," and that there was no denial of due process to the petitioner (R. 21; Ex. C).

On November 21, 1955, petitioner filed a motion for a new trial in the District Court, contending that the court had erred in its decision and stating that petitioner had just filed another motion to reopen the hearing for the purpose of presenting new evidence (R. 20–21). Attached to the new motion before the Board were 5 affidavits by persons closely acquainted with petitioner who alleged that they did not believe that petitioner had ever been a member of the Communist Party. Only one of the affidavits was by any

of the 19 persons named by Mr. Thornburgh as members of the Holly Park Branch Communist Party when petitioner was, as testified by Mr. Thornburgh, such a member (Ex. D). In January 1956, the Board of Immigration Appeals denied this renewed motion, saying that her Party membership had been established by credible evidence and petitioner had not made any showing that her evidence could not have been presented at the hearing (R. 21).

Petitioner did not appeal from the District Court judgment of November 10, 1955, and was ordered to report for deportation on March 27, 1956 (R. 21).

On March 26, 1956, the instant proceedings for a writ of habeas corpus, declaratory judgment, and injunctive relief, challenging the order of deportation, were instituted in the District Court (R. 3–12). In its return to the court's order to show cause, the government summarized the foregoing events and asked for a dismissal of the petition on the grounds that petitioner had been accorded a full and fair hearing and that the order of deportation was supported by substantial evidence (R. 14–17). The District Court denied the relief requested by petitioner. It found that her case had already been judicially reviewed and that in the previous proceeding the court had held that the order was supported "by reasonable, substantial and probative evidence, and that there was no denial of due process to the petitioner therein" (R. 21). The court held the earlier judgment to be final. It also found that the denial of the renewal of the motion to reopen, after the previous judicial re-

view, "did not deny petitioner due process nor did it render the hearing unfair" (R. 21–23). The Court of Appeals affirmed (R. 35).

ARGUMENT

1. Petitioner contends that the courts below should not have given controlling weight to her prior proceeding for judicial review, from which she chose not to appeal. Although, technically speaking, the doctrine of *res judicata* does not usually apply to habeas corpus proceedings, the courts may nevertheless give controlling weight to a prior action raising the same issues. *Salinger* v. *Loisel,* 265 U. S. 224; *Collins* v. *Loisel,* 262 U. S. 426. The same rationale applies to a prior action for declaratory judgment seeking the same relief as would have been available by habeas corpus. Section 10 (b) of the Administrative Procedure Act, 5 U. S. C. 1009 (b), which provides for judicial review of administrative proceedings, states that such action may be instituted by "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)." See *Shaughnessy* v. *Pedreiro,* 349 U. S. 48. Certainly, Congress by this language intended that there should normally be only one judicial review, and not successive reviews in each of the different forms referred to in Section 10.[3] *Cruz-Sanchez* v. *Robinson,*

[3] Compare 28 U. S. C. 2244 and 2255 (5th paragraph), which indicates a tendency on the part of Congress to limit the practice of suing out successive and repetitious writs of habeas corpus and other like remedies.

136 F. Supp. 52 (D. Cal.); see also *Shaughnessy* v. *Pedreiro, supra,* at p. 53; *Herman* v. *Gilliland,* 218 F. 2d 852 (C. A. D. C.); *In re Federal Water & Gas Corp.,* 188 F. 2d 100 (C. A. 3), certiorari denied, *sub nom. Chenery Corp.* v. *Securities & Exchange Commission,* 340 U. S. 831.

Petitioner's first action in the District Court was based substantially on the same grounds as the instant second case. The only added factor in the second case was the filing before the Board of Immigration Appeals of the renewal of the motion to reopen. But that motion was not different from the first motion to reopen which was denied by the Board of Immigration Appeals before the District Court acted on the first case (*supra,* pp. 6–7, 8–9). The only new matter in the second motion was the presentation of the 5 affidavits; and only one of these affidavits was by any of the many persons named by Mr. Thornburgh as having attended Communist Party meetings with petitioner. Furthermore, all the affiants were closely acquainted with petitioner and apparently could have been produced at the original administrative hearing. Petitioner does not give any real reason why they were not produced.

Petitioner's conduct throughout these proceedings suggests tactics of delay. After obtaining an adjournment of the administrative hearing to put in evidence, she did not do so. She waited until after an adverse decision by the Board of Immigration Appeals to claim that she had evidence favorable to her case. After an unfavorable decision by the Dis-

trict Court, she did not pursue her appeal. Instead, she made a second motion to reopen before the Board of Immigration Appeals without offering any substantial new grounds, and then, on that flimsy basis, started a new judicial proceeding in the District Court. The courts below were not required to give their approval to such maneuvers.

2. Recognizing that this second action is a duplication of the first, petitioner seeks (Pet. 11–12) to avoid the doctrine discountenancing repetitious litigation by alleging that a significant change in law occurred during the interim between the two actions. But such is not the case.

(*a*) Petitioner first seeks (Pet. 14–15) to extend this Court's decision in *Jencks* v. *United States*, 353 U. S. 657, to deportation hearings. She argues that the refusal of the special inquiry officer, in her hearing before the Immigration and Naturalization Service, to require production of the F. B. I. reports involving her which witness Thornburgh made while he was a member of the Communist Party constituted a denial of due process. But we do not believe that *Jencks* controls the disposition of the instant case. That decision was limited to criminal proceedings. The Court expressly recognized the authority of the Attorney General (see fns. 16 and 17, p. 670) to adopt regulations making Department of Justice records confidential, but the Court qualified its acceptance of that authority by the holding that "in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the de-

fendant go free. * * *' ". By Public Law 85–269, 85th Cong., 1st Sess. (18 U. S. C. 3500), enacted on September 2, 1957, Congress embodied the *Jencks* decision into statutory law. S. Rept. No. 981, p. 2; H. Rept. No. 700, pp. 2–3 (85th Cong., 1st Sess.). By express provision, the statute, which requires the production of statements and reports of witnesses, expressly limits such production to "criminal prosecution[s] brought by the United States." Accordingly, the general rule that Department of Justice records are confidential and do not have to be produced still controls in deportation hearings.[4] A long line of decisions by this Court holds that deportation proceedings, however dire the consequences, cannot be considered criminal. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–595; *Mahler* v. *Eby*, 264 U. S. 32, 39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Lees* v. *United States*, 150 U. S. 476, 480; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730.

Nor can it be said that *Jencks* establishes that the procedure there laid down is necessary to due process of law in all proceedings. Rather, it enunciated a rule, comparable to a rule of evidence, to be followed by the federal courts in criminal cases. Administrative proceedings, on the other hand, need not follow

[4] See the interlocutory ruling of the National Labor Relations Board (one member dissenting) in *The Great Atlantic and Pacific Tea Company* v. *Independent Bakery Workers Union* and *The Great Atlantic and Pacific Tea Company* v. *Smith*, 40 Labor Relations Reference Manual (1957), pp. 1338–1342. Because of the pendency of settlement negotiations, the hearings on the merits of these cases have not been initiated.

judicial rules of evidence. The evidence need only be relevant and material; and the final determination need only be supported by "reasonable, substantial and probative evidence" (Immigration and Nationality Act of 1952, 8 U. S. C. 1252 (b)). The "* * * differences in origin and function * * *" of administrative agencies [such as the Immigration and Naturalization Service] "* * * preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 142–144. Therefore, the failure of an administrative agency to apply a procedure which the federal courts are required to follow in criminal cases does not, in itself, result in a failure to afford a fair hearing. The true test is whether, all circumstances considered and with due regard for the nature of the proceedings, the petitioner has received a fair hearing.[5] Here, the witness did not testify from notes but from his independent recollection. Under the rule of *Goldman* v. *United States*, 316 U. S. 129, 132, production would not have been required in such circumstances, even in a criminal case. And, as we have shown, there is no reason to believe that petitioner encountered any fundamental unfairness at her hearing.

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[5] *United States* v. *Matles*, (E. D. N. Y., decided July 11, 1957), a denaturalization proceeding where a new trial was ordered because of failure to comply with the *Jencks* case, and upon which petitioner relies (Pet. 15), involves a judicial proceeding rather than an administrative hearing.

(*b*) The hearing officer did not commit any error when he drew an adverse inference from petitioner's silence, as this Court has consistently held. *Mahler* v. *Eby*, 264 U. S. 32; *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–155; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 111; *United States ex rel. Circella* v. *Neely*, 115 F. Supp. 615 (N. D. Ill.), affirmed, 216 F. 2d 33 (C. A. 7) *sub nom United States* v. *Sahli*, certiorari denied, 348 U. S. 964. He first warned petitioner that the government's evidence showed that she had been a member of the Communist Party and indicated that, without more evidence, he would so find. Petitioner chose to let that evidence stand rather than introduce any evidence in her own behalf. Thus, the hearing officer's drawing of the adverse inference was in reality a perfectly proper statement that the government had presented a prima facie case which petitioner was called upon to rebut.

Petitioner's reliance on the Court's recent decision in *Grunewald* v. *United States*, 353 U. S. 391, is incorrect. As she herself notes, *Grunewald* involved criminal proceedings where the failure of the accused to take the stand may not be the subject of an adverse inference. Moreover, Halperin (in that case) had invoked the Fifth Amendment and the Court held that no inference of guilt could be drawn from the invocation of a constitutional privilege. Petitioner here did not claim any privilege but simply refused to offer any evidence on her own behalf, leaving the government's evidence uncontradicted; in those circumstances, this Court has uniformly held in deportation cases that it is not error to rely on that silence.

3. As held by the District Court in the first action, there was sufficient probative evidence at the deportation hearing to support the finding that petitioner was a knowing member of the Communist Party during 1945 and 1946. That evidence was to the effect that petitioner was a card-carrying, dues-paying, meeting-attending, member of the Party. See *supra*, pp. 3–4. The issue of Mr. Thornburgh's credibility was for the trier of facts to determine, not for the District Court on habeas corpus proceedings. The special inquiry officer found the witness credible, despite his inability to remember details.

In moving before the Board of Immigration Appeals to reopen the proceedings, petitioner alleged that she would now show that she was never a member of the Communist Party at all. She did not seek to bring herself within the qualifications of "membership" noted in *Galvan* v. *Press*, 347 U. S. 522, although the *Galvan* decision was handed down prior to her administrative hearing. *Rowoldt* v. *Perfetto*, No. 5, decided December 9, 1957—involving an issue as to the nature of "nominal", or nonpolitical, Communist Party membership—is thus inapplicable to petitioner's case, both because she did not properly raise that issue and because the facts as to her membership sufficiently show political awareness. This is indicated by the very cases on which petitioner relies, *Niukkanen* v. *Boyd*, 241 F. 2d 938 (C. A. 9) and *Jimenez* v. *Barber*, 235 F. 2d 922 (C. A. 9), in both of which the Court denied petitions for writs of certiorari on December 16, 1957, after the *Rowoldt* decision

(Nos. 121 and 25). Petitioner was shown to be a dues-paying member who attended a number of Party meetings, even though she was not one of the more active members. She was given ample opportunity to refute that testimony both at the original hearing and at the reopened hearing 28 days later. She offered no evidence at all to indicate nominal or unaware membership.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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